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Supreme Court of the United States

OCTOBER TERM, 1919.

No. 300:

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CHARLES K. HOGAN,

Appellant,

vs.

**WILLIAM H. O'NEILL, Chief of Police of the
City of East Orange, New Jersey.**

BRIEF OF APPELLANT.

REUBEN D. SILLIMAN,

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Supreme Court of the United States

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CHARLES K. HOGAN,
Appellant,
vs.

WILLIAM H. O'NEILL, Chief of
Police of the City of East
Orange, New Jersey.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

How the Case Comes to this Court.

This is an appeal from an order of the United States District Court for the District of New Jersey discharging a writ or habeas corpus and remanding the appellant to the custody of the appellee, the chief of Police of East Orange (Record 32), for rendition to the agent of the state of Massachusetts for trial there upon an indictment charging him with conspiring to steal the property, moneys and chattels of the Market Trust Company, a banking corporation (Record 17).

The District Court had jurisdiction to hear the Matter and this Court has Jurisdiction to hear the Appeal.

Biddinger vs. Commissioner of Police of the City of New York, 245 U. S., 128.

Strassheim vs. Dally, 221 U. S., 280.

Roberts vs. Reilly 116 U. S., 80, 94.

Statement of the Case.

Charles K. Hogan, the appellant, has resided openly and continuously at his home, number 278 William Street, in the City of East Orange, New Jersey, since October, 1915. He is a highly respected citizen, devoted to his family, consisting of his wife and two children, esteemed by his neighbors and friends, thirty of whom have furnished affidavits as to his habits and other facts inconsistent with the charge made and facts necessary to procure his rendition (Record, 5-16).

Affiliated with a stock brokerage firm in New York City, Hogan executed orders for the purchase and sale of stocks and bonds for one, Luther R. Hanson. Beginning in the panic of 1907, Hanson, who was a junior officer of the Market Trust Company, occasionally purchased stocks and bonds through Hogan. In December, 1917, Hanson, thinking the stock market prices had reached their low level and reasoning that since the United States had gone into the war on the side of the Allies and victory was assured, the prices of securities would advance, sent money to Hogan for speculation. Between August 18, 1918, and Jan-

uary 16, 1919, Hanson sent checks to Hogan in New York, aggregating some \$22,000 which were deposited by Hogan with the brokers for the purpose for which they were sent (Record, 3, 22-24, 26). It is charged that Hanson stole the money from the Market Trust Company and it is sought to hold Hogan accountable with him. During the time the checks were received and for nearly a year prior thereto Hogan had not been in Massachusetts and he charges in his petition for the writ of *habeas corpus* that to obtain his rendition a conspiracy indictment was procured which reaches back to August 18, 1916, exactly two years prior to the date when Hanson's first alleged theft occurred, and Hogan charges that this was done in order to include a time when he had been in Massachusetts (Record, 3 and 4).

The conspiracy indictment is the only one on which his rendition is sought, is short and is as follows:

*"The Commonwealth of Massachusetts,
Suffolk, ss.:*

At the Superior Court Begun and Holden at the City of Boston, within and for the County of Suffolk, for the Transaction of Criminal Business, on the First Monday of February, in the year of Our Lord One Thousand Nine Hundred and Nineteen.

The Jurors for the Commonwealth of Massachusetts, on their oath present that Charles K. Hogan and Luther R. Hanson on the eighteenth day of August in the year of our Lord one thousand nine hundred and sixteen

conspired together to steal the property, moneys, goods and chattels of the Market Trust Company, a banking corporation legally established and existing.

A true Bill.

SAMUEL S. REINSTEIN,
Foreman of the Grand Jury.

J. C. PELLETIER,
District Attorney."

It will be observed that it is not charged that the alleged conspiracy was entered into in Massachusetts nor is it charged that any act was done in pursuit of it in Massachusetts. No fact is stated laying the alleged crime within the State of Massachusetts. It might have been entered into in any other State and wholly performed outside of Massachusetts.

Upon the conspiracy indictment and two meager affidavits, accompanied by the usual forms of request for rendition, and nothing more, an application was made by the Governor of Massachusetts to the Governor of New Jersey for the rendition of Hogan as a fugitive from justice. One of the two affidavits was made by James H. Claffin, a stranger to the appellant, who alleged in his affidavit that Hogan was at and previous to the eighteenth day of August, 1916, a resident of the City of Boston and that he fled from the Commonwealth of Massachusetts on or about the eighteenth day of August, 1916 (Record 2). Claffin was at the hearing and was called to the stand. He testified he had no personal knowledge as to the residence of Hogan when he made that affidavit. "Q. None

whatever? A. No" (Record 29-30). The other of the two affidavits was sworn to by one, Henry E. Bothfeld, who described himself as one of the complaining witnesses. Bothfeld did not come to the hearing and it is fair to say that his affidavit was as worthless as that of Claffin. No other fact connected with the charge of conspiracy, residence or presence in Massachusetts was presented in the papers for Hogan's rendition.

The Governor of New Jersey did not grant appellant a hearing, but issued his warrant and compelled the appellant to apply for a writ of *habeas corpus* which was granted (Record 32).

Hogan swore in his second petition for a writ of *habeas corpus*, which was verified after he was on the stand, that he never conspired with Hanson in Massachusetts, or elsewhere, that the papers charging him with the alleged crime are insufficient to support the warrant for his removal to Massachusetts and that the charge is made for the purpose of procuring his rendition with intent to try him on larceny counts in case he shall be taken to Massachusetts.

The sole support of any charge against him would appear to be the receipt by Hogan in New York of money to cover Hanson's stock speculation and the whole foundation for the charge would seem to be that he ought to have inquired from Hanson where he got the money before using it (Record 24).

The appellant, Hogan, was called as a witness at the hearing in the court below and testified affirmatively that he never conspired with Hanson, that he had no conversation with him respecting the Market Trust Company, its property, moneys,

credits, goods or chattels at any time in Massachusetts or elsewhere and that he had no communication with Hanson by letter regarding the obtaining of any moneys or property or effects of the Market Trust Company (Record 19). This testimony is supported by his wife (Record 23) and is not contradicted.

Disregarding that the indictment did not charge that the alleged conspiracy was entered into in Massachusetts and that there was no proof of an overt act in Massachusetts, the lower court in a brief oral opinion held that the admission of Hogan that he was in Massachusetts for other purposes at about the time laid in the indictment was sufficient to justify his rendition and ordered him remanded to the custody of the appellee, allowing this appeal.

The Controversy.

As set forth in the seven assignments of error (Record 33) the controversy is over the validity of the warrant of rendition upon an indictment, which does not charge the commission of a crime in Massachusetts, and of the order of the court below upon the proceedings had, which did not show any overt act in Massachusetts.

POINT I.

The Court below erred in deciding that the appellant should be delivered to the agent of Massachusetts for trial there, since the indictment does not charge him with having committed a crime in Massachusetts; nor is there any proof of an overt act done by him in Massachusetts in pursuit of the conspiracy charged in the indictment.

In other words, there was no proof that Hogan was a fugitive from justice within the natural meaning of the words and the established interpretation of the rendition clause of the Constitution under the decisions of this court. There is no allegation in the indictment that the alleged crime was committed in Massachusetts, while the evidence taken at the hearing showed that no conspiracy was entered into there or elsewhere. The failure to charge that the alleged conspiracy was entered into in Massachusetts is a fatal defect. The laying of the crime in Massachusetts is required by the uniform decisions of this court. The reason for the lapse will be readily understood, and it is not rare to find such lapses when an act is done for an ulterior purpose. There was, in fact, no conspiracy entered into. The conspiracy indictment was found, we assert confidently, to procure the rendition of Hogan to Massachusetts for trial on larceny counts, as he has charged in his petition (Record 4), and, perhaps, to give scope for the admission of evidence. But, as often happens in such cases, an indispensable allegation was omitted.

Hogan is not charged with having committed a crime within the State which seeks his rendition. That appears on the face of the papers, is a fatal defect and is "always open to judicial inquiry," in these rendition cases, "on an application for discharge under a writ of *habeas corpus*." *Roberts vs. Reilly*, 116 U. S., 80, 95; *Hyatt vs. New York*, *ex rel Corkran*, 188 U. S., 691, 709-710.

In an early case in the Circuit Court for Illinois, *ex parte Smith*, 3 McLean 121, Federal Cases No. 12,968, decided in 1843, the extradition of Joseph Smith, the founder of the Mormon Church, was sought by the State of Missouri on a charge of having been an accessory to an attempted murder alleged to have been committed by another in Missouri. The court said:

"This case presents the important question, arising under the Constitution and Laws of the United States, whether a citizen of the State of Illinois can be transported from his own state to the State of Missouri, to be there tried for a crime, which, if he ever committed, was committed in the State of Illinois."

And, after referring to the constitutional provision and the affidavit upon which it was sought to procure his extradition, it was decided:

"To authorize the arrest in this case, the affidavit should have stated distinctly; 1st. That Smith had committed a crime. 2d. *That he committed it in Missouri.*" The affidavit not having so charged, Smith was released upon a writ of *habeas corpus*.

All the decisions of this court, though liberal to a degree in other respects, declare it is essential that the indictment charge the accused with the commission of a crime within the state demanding him.

In *Commonwealth of Kentucky vs. Dennison*, 24 Howard, 66, an early case in this court, although emphasizing the duty of the states to render up persons charged with the commission of crimes in other states, it was recognized that it was essential that the person whose extradition is sought should be charged with the commission of a crime within the state demanding him. It is said:

“The clause in question like the clause in the confederation, authorizes the demand to be made by the executive authority of the state *where the crime was committed*” (24 Howard, 102).

And again,

“The conclusion is irresistible, that this compact ingrafted in the Constitution” (the rendition clause) “included, and was intended to include every offense made punishable by the law of the state *in which it was committed*” (24 Howard, 103. Our Italics).

In *Robb vs. Connolly*, it was conceded that where it appears on the face of the papers that the accused is not charged with the commission of a crime *in the demanding state* it is open to him to

challenge the papers upon a writ of *habeas corpus* issued either by the State or Federal courts (111 U. S., 624, 638).

In *Ex parte Reggel*, it is said that the indictment must be one charging the accused with a crime "*committed within*" the demanding state's "limits"; and again, that where the demand upon the governor of the state having custody of the accused is accompanied by an authentic indictment, charging him "with a specific crime *committed within her limits*", the accused should be delivered to the demanding state as a fugitive from justice (114 U. S., 642, 652-653).

In *Roberts vs. Reilly*, it is said:

"The Act of Congress (section 5278, Revised Statutes) makes it the duty of the executive authority of the State to which such person" (one charged with crime) "has fled, to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any State demands such person as a fugitive from justice, and produces a copy of an indictment found or affidavit made before a magistrate of any State, charging the person demanded with *having committed a crime therein*, certified as authentic by the Governor or Chief Magistrate of the State from whence the person so charged has fled" (116 U. S., 80, 95. Our italics).

In *Hyatt vs. New York ex rel. Corkran*, Corkran was charged with having committed the crimes of larceny and false pretenses in Tennessee. It was conceded that he had not been in Tennessee at the time that it was charged the crimes were commit-

ted there but he had been in Tennessee on other business eight days later. This Court said :

"It is, however, contended that a person may be guilty of a larceny or false pretense within a state without being personally present in the state at the time. Therefore, the indictments found were sufficient justification for the requisition and for the action of the governor of New York thereon. This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the State of Tennessee at the time of the commission of those acts for which he had been indicted, assuming that he committed them outside of the state.

"The exercise of jurisdiction by a state to make an act committed outside its borders a crime against the state is one thing, but to assert that the party committing such act comes under the Federal Statute, and is to be delivered up as a fugitive from the justice of that state, is quite a different proposition."

The Court then refers to the rendition statute and emphasizes by italics, three times repeated, that the fact of flight from the demanding state's jurisdiction is an important consideration.

It was held that a mere constructive presence in the demanding state at the time of the alleged commission of the offense is not sufficient to render the person a fugitive from justice; that he must have been personally present within the state at the time of the alleged commission of the act, and that his presence for one day on business connected with a

lumber company in which he was a stockholder, eight days after the alleged commission of the crime, did not, when he left the state, render him a fugitive from justice within the meaning of the statute. The Court also calls attention to the fact that the complaint was not made nor the indictment found, until months after he had been there.

Both the statute and the clause of the Constitution contemplate crime committed within the demanding state and flight into another state after the crime has been committed.

The purpose of the clause was to prevent the several states from becoming a haven for those who had committed crimes in what was then in a very real sense a foreign jurisdiction, and, while the character of the flight has been held unimportant, the decisions of this Court have continued to adhere to the vital intent of the clause that the accused should be charged with having committed a crime within the state demanding him and some direct connection with that crime must also be shown before a person can be taken to another state for trial there.

In *Munsey vs. Cloagh*, 196 U. S., 364, Martha S. Munsey, the accused, was charged with having published, as genuine, a forged will, at Cambridge, Middlesex County, Massachusetts. She fled to New Hampshire where her extradition was sought upon the usual papers, including copies of the indictment. At the hearing she refused to introduce any testimony.

After disposing of certain objections to the form of the indictment, this Court said upon the matter with which we are particularly concerned:

"Whether she was a resident or not is not important, as to the third count, if she were present in the state and committed the crime therein" 196 U. S., 374.

In *Pettibone vs. Nichols*, 203 U. S., 192, Pettibone charged that he had been kidnapped in Colorado and taken to Idaho after the governor of Colorado had issued a warrant for his extradition. On the point we are making, it is said that as papers submitted to the governor of Colorado showed that the accused was regularly charged by indictment with the crime of murder "committed in Idaho", and was a fugitive from its justice, the governor of Colorado was entitled to accept the papers as *prima facie* sufficient (203 U. S., 204).

In *Appleyard vs. Massachusetts*, 203 U. S., 222, Appleyard was indicted in the Supreme Court of New York for Erie County for the crime of grand larceny alleged to have been committed in that county. He was found in Massachusetts and his extradition was sought.

After referring to three hearings which the accused had had upon the merits of his claim that he was not a fugitive from justice and the fact that he was charged in the indictment with having committed the crime at Buffalo, in Erie County, in the state of New York, this court said:

"A person charged by indictment or by affidavit before a magistrate with the commission *within a state* of a crime covered by its laws, and who, after the date of the commission of such crime, leaves the state—no matter for what purpose or with what motive, nor with what belief—becomes from the time of such leaving, and within the meaning of the Constitution and the laws of the United

States, a fugitive from justice, and if found in another state, must be delivered up by the governor of such state to the state whose laws are alleged to have been violated, on the production of such indictment, or affidavit, certified as authentic by the governor of the state from which the accused departed. Such is the command of the supreme law of the land which may not be disregarded by any state" (203 U. S., 222, 227). (Our italics.)

In *Illinois ex rel. Mc Nichols vs. Pease*, 207 U. S., 100, the accused was charged with having committed the crime of larceny in the County of Kenosha, State of Wisconsin. He was arrested in Illinois and his removal to Wisconsin was sought upon papers, including a verified complaint or affidavit charging that he stole money at the City of Kenosha in said county. The governor, having issued his warrant, a writ of habeas corpus was obtained from the Supreme Court of Illinois. The accused contended he was not in the state on the day laid in the indictment. But this court held that his proof was not sufficient to overcome the prima facie case made by the warrant, and, on the point we are calling attention to, said:

"It was incumbent upon him" (the accused), "by competent proof, to rebut the presumption arising on the face of the extradition warrant and requisition papers that he was a fugitive from justice for a crime committed in Wisconsin on September 30, 1905." (Our italics.)

In *Strassheim vs. Daily*, 221 U. S., 280, Daily had been indicted in Michigan for bribery and also for obtaining money from the state by false pre-

tenses. A requisition had been issued to the governor of Illinois who had issued his warrant for Daily's arrest. The United States District Court granted Daily a writ of habeas corpus, and, after a hearing, discharged him on the ground that the facts alleged in the indictment did not constitute a crime against the laws of Michigan. This court overruled that holding and held that Daily should be delivered to the agent of the state of Michigan because it was proved that he had been guilty of overt acts done in Michigan toward the alleged crime although the actual payment of the bribe may have been made elsewhere.

The indictment charged that on May 13, 1908, Daily bribed one, Armstrong, who was connected with the Michigan State Prison as Warden. Daily contended he had not been in Michigan at the time laid in the indictment and therefore could not be extradited. He had had a conversation with Armstrong in Chicago prior to July 22, 1907, at which he had said it was a mistake not to have accepted a proposition he had made for the sale of certain second-hand machinery which he desired to palm off on the board of control of the prison with which Armstrong was connected; that he thought it could be arranged and there would be a nice present in it for Armstrong, which Daily said would be one thousand dollars anyway.

On July 22, 1907, a bid signed by Daily was sent in and he was with the board of control in Michigan, accompanying it, when it was considered and accepted. He had made a previous visit to the board in the spring, and he was there in November to see the machinery and delay shipment. At the latter date, he saw Armstrong in Michigan and

had a conversation with him relating to the subject. Finally, in April, 1908, Daily was at the prison again, and, in further execution of the program arranged by him and Armstrong, the contract price was paid in full. Daily paid Armstrong fifteen hundred dollars, as he had agreed. This Court said:

"If a jury should believe the evidence, and find that Daily did the acts that led Armstrong to betray his trust, deceived the board of control, and induced by fraud the payment by the state, the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the state until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power. *Com vs. Smith*, 11 Allen, 243, 256, 259; *Simpson vs. State*, 92 Ga., 41, 22 L. R. A., 248; *American Banana Co. vs. United Fruit Co.*, 213 U. S., 347, 356. We may assume therefore, that Daily is a criminal under the Law of Michigan.

Of course, we must admit that it does not follow that Daily is a fugitive from justice. *Hyatt vs. New York*, 188 U. S., 691, 712. On the other hand, however, we think it plain that the criminal need not do within the state every act necessary to complete the crime. *If he does there an overt act which is and is intended to be a material step toward accomp-*

lishing the crime, and then absents himself from the state and does the rest elsewhere, he becomes a fugitive from justice when the crime is complete, if not before. *Re Cook*, 49 Fed., 833, 843, 844; *Ex parte Hoffatol*, 180 Fed., 240, 243; *Re Sultan*, 115 N. C., 57. For all that is necessary to convert a criminal under the laws of a state into a fugitive from justice is that he should have left the state after having incurred guilt there (*Robert vs. Reilly*, 116 U. S., 80), and his overt act becomes retrospectively guilty when the contemplated result ensues. Thus, in this case, offering the bid and receiving the acceptance were material steps in the scheme, they were taken in Michigan, and they were established in their character of guilty acts when the plot was carried to the end, even if the intent with which those steps were taken did not make Daily guilty before." (Our italics.)

This language clearly recognizes that a citizen of one state cannot be forcibly taken for trial in another state upon the mere finding of an indictment, laid at a time when the accused chanced to be in the demanding state on innocent business or pleasure. Something more is required. There must be an overt act done in the demanding state in pursuit of the alleged crime and the commission of the overt act must be proved. Mere suspicion and accusation are not enough to support rendition when the proceedings for the delivery of the accused to the demanding state are challenged in the courts.

In *Biddinger vs. Commissioner of Police*, 245 U. S., 128, Biddinger was charged with having committed crimes in the state of Illinois at various times between the fifteenth of October, nineteen hundred and eight, and the second of September, nineteen hundred and ten. The governor of Illinois demanded his extradition from New York as a fugitive from justice and Governor Hughes, after according a full hearing, made a careful decision and issued to the Commissioner of Police of the City of New York an executive warrant for Biddinger's arrest, by which the agent of Illinois was authorized to receive and convey him to that state. Biddinger obtained a writ of habeas corpus from the United States District Court, which writ was discharged and an appeal taken to this court. Admitting that he was in the state of Illinois at the time it was charged he had committed crimes there, Biddinger showed that he had resided there openly and continuously for more than three years after the dates on which he was charged with having committed the crimes in Illinois and claimed that therefore he could not have been a fugitive from justice.

This court, after reviewing the history of the provision of the Constitution, held that the rendition clause was intended to reach all persons, who, *having committed a crime in one state, go to another*, citing *Roberts vs. Reilly* and *Applegard vs. Massachusetts* and other cases, and quoting the passage from the *Applegard case* which we have quoted above. Governor Hughes heard and disposed of the application for rendition in an able manner and this court was undoubtedly favorably impressed thereby. But we do not always have men of the

intelligence, independence and faithfulness of Governor Hughes in the capitols of our states. There is a political office and such matters are usually handled carelessly, as mere routine, or are subject to political pressure. Not so the courts. The same person who may be subject to political pressure in the one office may be impartial and fearless in the other. It is due to a difference of atmosphere and traditions and the right of review which always obtains in the courts.

The Biddinger case is the last one decided here and is in accord with all of the other cases upon the point we are contending for. The indictment must charge the accused with having committed a crime within the state demanding him and an overt act must be shown to have been committed by him in the demanding state before he can be forcibly taken from his home for trial elsewhere. It is not within the purpose of the Constitutional provision, nor within its interpretation by this court that one may be charged with a crime, without any place specified and without proof of an overt act and taken for trial to another state; in fine, there must be evidence, constituting more than bare suspicion and loose accusation, before one can be so removed.

Unless an indictment charging crime within the demanding state, together with proof of an overt act toward its commission is required, when challenged, it will not be safe for people engaged in competitive business to travel to other states. One would never know when a vague charge of conspiracy, reaching back, perhaps for years, to a time when he had chanced to be in the rival state might be put forward as a means of coercion in some later controversy.

It is common knowledge that an influential resident can readily procure an indictment against a rival non-resident. If a mere charge of conspiracy is to be sufficient to procure extradition, provided one has ever been so unfortunate as to have visited another state, interstate travel will become a perilous adventure for some very worthy but ambitious citizens.

POINT II.

The appellant may be lawfully tried in New York for receiving funds alleged to have been stolen by Hanson and sent to Hogan, without violating the limitations of the rendition clause of the constitution as established by the uniform decisions of this court.

At such a trial, the appellant entertains full confidence he will be able to establish his innocence. He seriously objects to be taken to Massachusetts for trial there, where the indictment for conspiracy may furnish a dragnet for evidence of doubtful character and where prejudice against the stock brokerage business may be sufficient to lead to his conviction on circumstantial and doubtful evidence, although he is innocent of any crime, and where he will have great difficulty in procuring bail.

A recent case, decided by the Court of Appeals of New York in 1919, holds that one may be tried in New York for receiving stolen property with a liberality that makes it possible to bring every

guilty person to justice. Money drawn from a bank in New York was considered to be the original money stolen, although a mere credit memorandum of the money stolen in Pennsylvania had been deposited and other money withdrawn. One party to the transaction obtained a credit in Philadelphia upon securities stolen in New York and deposited the credit memorandum in a trust company in New York and afterward drew money representing part of the credit and gave the money to a third person who knew about the transaction and how the credit was obtained. It was held that the third person, accepting the money and knowing of the theft, was guilty of receiving stolen property.

People ex rel. Briggs vs. Hanley, 226 N. Y., 453.

This decision affords a most liberal scope for the trial of the crime of receiving stolen property. Is it not better that the prosecution of the appellant herein, if there must be one, should be in New York, without changing the construction of the constitutional provision, than that Hogan should be taken to Massachusetts under circumstances that will require the overthrow of the established interpretation of the rendition clause of the Constitution? If the extradition order appealed from shall be upheld, then, as we have already pointed out, anyone can be dragged to prison in a distant state on a loose charge of conspiracy by antedating the charge to a time when the accused chanced to be in the demanding state and without any proof that he is in fact a fugitive from justice.

In a case decided by the United States District Court for the Western District of Michigan, in 1878, Judge Withey, District Judge, said:

"The importance of adhering to the views expressed," (that one should be discharged on *habeas corpus* unless it is made to appear that he is, in fact, a fugitive from justice) "could be made apparent by referring to many cases where indictments have been found in one state upon no evidence or upon wholly insufficient evidence, and where the indictment subserved no end of justice. We have in mind an indictment found in a neighboring state against a citizen of Michigan upon wholly insufficient evidence inspired by revenge and black-mailing purposes. * * * We noticed in the papers of an adjoining state, not long since, that one or more indictments had been found by a grand jury without any evidence whatever, on request of a prosecuting officer.

"Such cases, considering the facility with which indictments are sometimes obtained, afford sufficient justification not only to the executive of a state on whom a demand for extradition is made, but to the courts to see that the case falls within the laws."

Re Jackson, 2 Flip., 183; Federal Cases No. 7, 125.

In *ex parte Smith*, decided by the United States Circuit Court for the District of Illinois, in 1843, Judge Pope said:

"From this case," (*Tyrrel vs. Wilde*, an early English case, involving a prosecution under the law which made it a crime to abet frequenters of conventicles) "it appears that suspicion does not warrant a commitment, and that all legal intendments are to avail the prisoner. That the return is to be most strictly construed in favor of liberty. If suspicion in the foregoing case did not warrant a commitment in London by its officers, of a citizen of London, might not the objection be urged with greater force against a commitment of a citizen of our state, to be transported to another on suspicion? No case can arise demanding a more searching scrutiny into the evidence, than cases arising under this part of the Constitution of the United States. It is proposed to deprive a freeman of his liberty—to deliver him into the custody of strangers, to be transported to a foreign state, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him—separated from his friends, his family and his witnesses, unknown and unknowing. Had he an immaculate character, it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis. The framers of the Constitution were not insensible of the importance of courts possessing the confidence of the parties. They therefore provided that the citizens of the different states might resort to the federal courts in civil causes.

"How much more important that the criminal have confidence in his judge and jury?" (3 McLean, 121; Federal Cases No. 12,968.)

While this language may sound somewhat exaggerated it really expresses the fears of one who, though innocent, is actually threatened with rendition. The matter of procuring bail, obtaining and consulting counsel, the feeling that one is a stranger in another state and unfamiliar with the courts and procedure are all very real to the one who faces the predicament.

POINT III.

Rendition ought not to be left to the governors of the states, where, when contested, it will depend upon political expediency. The present system has stood the test of time and the trial of the slavery issue and war. The suggested change would be an innovation. *Obsta principiis* is a safe and wise maxim.

The constitutional provision governing interstate rendition was meant to serve the ends of justice. This court has always so interpreted it and has maintained the jurisdiction of the courts.

As it is now, the governors may, and often do, avoid all political pressure, by doing as was done in this case, leave the contested hearing to the courts. People have confidence in the courts. They have the feeling, which is fully justified, that they will have a fair hearing there in accordance with established forms and the right to appeal to a higher court in cases of doubt or difficulty. But the people do not have the same confi-

dence in political officers for reasons that are obvious. The difference in the manner in which such a question is approached and handled by the governor's office is one consideration. Again expediency counts heavily, especially if the governor is ambitious and desires to become, say, a United States Senator and happens to be very busy about that at the time the rendition application is made to him. Language used by Judge Jenkins of Wisconsin, in a *habeas corpus* case brought before him in 1892 is applicable.

"Surely," he said, "it cannot be claimed that such action" (of the governor) "is conclusive upon personal right, and may not be inquired of by judicial tribunals. Surely it cannot be that right to personal liberty hangs upon so slender a thread as the arbitrary will of the authorities of the demanding and surrendering states." *In re Cook*, 49 Fed Rep., 833, 839.

POINT IV.

The order appealed from should be reversed.

Respectfully submitted,

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